

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34486

OHIO VALLEY RAILROAD COMPANY  
– ACQUISITION AND OPERATION EXEMPTION –  
HARWOOD PROPERTIES, INC.

Decided: February 23, 2005

This decision denies a request by Indiana Southwestern Railway Co. (ISW) to reconsider an earlier decision in which we denied ISW's petition to reject a notice of exemption filed by the Ohio Valley Railroad Company (OVR) to acquire by lease and operate certain trackage in Evansville, IN, or, in the alternative, to revoke OVR's exemption.

BACKGROUND

By verified notice filed on March 23, 2004, and served and published in the Federal Register on April 22, 2004 (69 FR 21899), OVR, a noncarrier, invoked the class exemption procedures at 49 CFR part 1150 subpart D to acquire by lease from Harwood Properties, Inc. (also a noncarrier), and operate as a common carrier approximately 2.8 miles of what appears to have been switching, industrial, or private track in the former Harwood Yard in Evansville, IN. The track that OVR would operate connects with lines operated by ISW.<sup>1</sup> Under the terms of the class exemption procedures, the exemption became effective on March 30, 2004.

On April 15, 2004, ISW filed a petition to reject the notice or revoke OVR's exemption, or to stay the effectiveness of the exemption. ISW argued that OVR's notice of exemption was defective and misleading and therefore void ab initio. ISW also argued that, while the class exemption

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<sup>1</sup> OVR reports that ISW has removed the switches connecting OVR's tracks to ISW's lines, and claims that this development has resulted in a service emergency. ISW has indicated that it will reinstall at least one of the switches to permit traffic to flow between the two carriers, and maintains that no service emergency exists. This matter will be addressed in a separate proceeding captioned Ohio Valley Railroad Company – Petition to Restore Switch Connection and Other Relief, STB Finance Docket No. 34608.

procedures could be available in cases involving noncarrier transferors, as here, the Board should restrict the use of the class exemption in such cases and require more information from the notice filer. Specifically, ISW maintained that, when the effect of the transaction would be to change the legal status of the trackage and operations conducted on it, the notice filer must provide supporting evidence or argument to demonstrate with specificity that the class exemption applies. Under such a standard, ISW contended that OVR failed to supply sufficient evidence in support of its notice.

On May 4, 2004, OVR replied to ISW's petition to reject or revoke, reasserting its intention to commence common carrier service over the tracks in question.

In a decision served on September 28, 2004 (September 28 Decision), we denied ISW's petition to reject or revoke, and dismissed as moot ISW's stay request. We stated that our class exemption regulations do not require OVR to submit evidence or argument to show that it is necessary for it to operate as a common carrier. Furthermore, we held that OVR properly invoked the class exemption to commence common carrier operations over the subject trackage, even though that track previously may have been either switching/industrial track excepted from the Board's licensing authority or private track beyond the Board's jurisdiction. We observed that the three cases ISW cited in support of its petition – Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal); Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb. 15, 2002) (Riverview Trenton); and Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, STB Finance Docket No. 34252 (STB served Dec. 5, 2002) (Yolo County) – are factually distinguishable. See September 28 Decision at 4.

On October 22, 2004, ISW filed the instant petition<sup>2</sup> requesting that we reconsider our September 28 Decision and reject OVR's notice or revoke its exemption. OVR filed a reply to ISW's petition on November 2, 2004. On November 11, 2004, ISW filed a motion to strike OVR's reply, to which OVR replied on November 18, 2004.

#### PRELIMINARY MATTERS

In its response to ISW's petition, OVR argues that the petition is time barred. According to OVR, under 49 CFR 1115.3(e), the petition for reconsideration needed to be filed no later than 20 days after the service date of the September 28 Decision – in this case, by October 18, 2004. ISW responds that its petition is timely because the Board can revoke an exemption at any time. ISW's

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<sup>2</sup> ISW styled its request as a "motion to reconsider" the September 28 Decision; it appears to be intended as a petition for reconsideration under 49 CFR 1115.3.

petition was filed 24 days after the September 28 Decision was served – 4 days beyond the deadline set forth in section 1115.3(e). Under the circumstances, we will accept it as a petition to reopen an administratively final decision pursuant to our rules at 49 CFR 1115.4.

In its motion to strike OVR's reply, ISW accuses OVR of attempting to introduce new matters into the proceeding, including: allegations about the switching charges that ISW would charge for the movement of certain traffic moving to or from OVR; evidence pertaining to OVR's request for emergency relief in STB Finance Docket No. 34608; and OVR's claim to possess easement rights to effect a direct interchange with CSXT. ISW addresses each of these issues in its motion to strike, and discusses in detail other matters relating to STB Finance Docket No. 34608. If the Board does not strike OVR's reply, ISW asks permission to file a rebuttal to the new matter. OVR opposes the relief sought.

Although both parties have introduced evidence and argument that may not be entirely relevant to the issue at hand, we will not strike any portion of OVR's reply to ISW's petition. In its motion to strike, ISW provided detailed responses to all of the issues raised in OVR's reply. We will accept OVR's reply and will deny as unnecessary ISW's request to file a rebuttal.

#### POSITIONS OF THE PARTIES

ISW now argues that the Board's licensing provisions at 49 U.S.C. 10901 (including the class exemption from the formal requirements of that provision) cannot apply to OVR's proposed transaction, because the tracks over which OVR would operate are industrial or switching tracks, over which the Board cannot grant operating licenses pursuant to 49 U.S.C. 10906. ISW maintains that the September 28 Decision renders section 10906 meaningless, because no section 10906 switching or industrial track could be presumed forever removed from the Board's licensing authority. According to ISW, allowing OVR to engage in a "conversion" of the legal status of the trackage at issue here is inconsistent with the National Transportation Policy at 49 U.S.C. 10101 and contrary to the public interest.

ISW also questions the need for common carrier service by OVR, stating that there has been minimal traffic on OVR's tracks in recent years. Finally, ISW maintains that Yolo County mandates rejection of OVR's notice or revocation of its exemption, because OVR failed to demonstrate in its notice of exemption that the trackage that it would operate possesses "the required indicia of regulated common carrier trackage." Petition for Reconsideration at 5.

In reply, OVR argues that ISW has failed to point to new evidence or changed circumstances or to establish material Board error warranting reconsideration of our September 28 Decision. OVR

argues that ISW has done nothing but attempt to reargue the legal issues that it raised in its petition to reject or revoke.

OVR also reiterates its commitment to provide common carrier service over the trackage in question, and states that it will serve an intermittent active shipper and is negotiating service arrangements with several other potential shippers. Finally, in reference to an ongoing dispute between the parties in STB Finance Docket No. 34608, OVR avers that ISW's petition for reconsideration is a collateral attack on OVR's efforts to obtain emergency relief in that proceeding.

### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, we will grant reopening of an administratively final decision only if the petitioner demonstrates that we committed material error, or that the prior decision is affected by new evidence or substantially changed circumstances. ISW does not clarify under which prong of our standard it seeks review of the September 28 Decision. Because it does not point to new evidence or changed circumstances, we infer that ISW is alleging Board error in denying its petition to reject or revoke. As discussed below, however, we find no material error, and ISW's petition must therefore be denied.

Our September 28 Decision adheres to our practice of accepting notices of exemption under 49 CFR part 1150 subpart D which encompass transactions in which the notice filer would commence common carrier service over lines that had previously been switching or industrial track under 49 U.S.C. 10906, or private tracks entirely beyond our jurisdiction. As we indicated in that decision, however, we may reject a notice or revoke an exemption involving such a transaction if there is evidence that the notice filer is abusing our class exemption processes or if the transaction engenders substantial controversy. See September 28 Decision at 4. We explained that, in Jefferson Terminal, Riverview Trenton, and Yolo County, interested parties had raised issues which warranted a closer review of the proposed transactions than would be appropriate under the class exemption process. Id. We stated that the facts in those cases were distinguishable from those in the present transaction, because those cases raised questions about the suitability of the class exemption process where there is considerable community concern over the impacts of the transaction (Jefferson Terminal and Riverview Trenton), or about whether the notice filer was merely attempting to use the class exemption to thwart the objectives of the line's owner (Yolo County). We held that OVR did not need to supply additional bases for seeking common carrier status in its notice, because no such requirement is contained in our regulations. Id. at 3.

ISW argues that Yolo County is on point and that it mandates rejection of OVR's notice or revocation of its exemption. Specifically, ISW asserts that the track OVR would operate is switching or industrial track under 49 U.S.C. 10906, and that Yolo County holds that such track cannot be the

subject of a notice of exemption.<sup>3</sup> Petitioner misconstrues Yolo County, which is factually distinguishable and is not controlling precedent here for the reasons set forth in our September 28 Decision.

A thorough examination of the transactions and filings related to Yolo County demonstrate that ISW is also incorrect with respect to its new section 10906 argument. The transaction encompassed in that case involved either switching/industrial track or private track owned by a noncarrier entity, the Port of Sacramento. As we explained in our September 28 Decision, however, it was not the status of the trackage that prompted the rejection of the Union Pacific Railroad Company's (UP) notice of exemption in that case. Rather, UP's notice was rejected because UP contemplated no significant operational changes to its existing non-common carrier switching activities at the port, and, more importantly, because UP was attempting to thwart the port's attempt to replace it as the operator of the port-owned trackage.

Moreover, the status of the port-owned tracks did not prevent another railroad from successfully invoking our class exemption procedures to operate the same tracks. In a concurrent notice of exemption proceeding involving the very same trackage at issue in Yolo County, the Board permitted Yolo Shortline Railroad Company (Yolo Shortline) to lease the tracks and operate as a common carrier with the port's approval. In the process, the Board denied a UP petition to reject Yolo Shortline's notice of exemption or to revoke its exemption. See Yolo Shortline Railroad Company – Lease and Operation Exemption – Port of Sacramento, STB Finance Docket No. 34114 (STB served Feb. 3, 2003) (Yolo Shortline). As in this proceeding, the Board there found no false or misleading information warranting rejection and no impropriety requiring greater regulatory scrutiny of the transaction than would be possible under the class exemption process. Thus, ISW's Yolo County/section 10906 argument does not square with either Yolo County or Yolo Shortline, is contrary to Board precedent, and is without merit.

Because, as discussed above, ISW has failed to establish that the Board committed material error, we will not reconsider our holding in the September 28 Decision in which we declined to reject OVR's notice of exemption or to revoke its exemption. Accordingly, ISW's petition to reopen will be denied.

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<sup>3</sup> We note that ISW's argument conflicts with the position it took in its petition to reject or revoke. In its earlier filing, while ISW argued that we should require more information from OVR before accepting its notice, it also "conceded that the class exemption procedures should be available in some instances where the transferor of the trackage is a noncarrier." *Id.* at 1. ISW does not argue here that we misunderstood its position when we rendered our September 28 Decision. Rather, it is attempting now to relitigate the matter by taking a new and different position.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. ISW's motion to strike portions of OVR's reply to the petition for reconsideration, or, in the alternative, for permission to file a rebuttal is denied.
2. ISW's petition for reconsideration is accepted as a petition to reopen our September 28 Decision pursuant to 49 CFR 1115.4.
3. ISW's petition to reopen is denied.
4. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary